APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 98-7547

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

RICHARD M. PATTERSON,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
James C. Cacheris, Senior District Judge
(CR-91-60-A, CA-98-355-AM)

Submitted: April 29, 1999 Decided: May 5, 1999

Before WILLIAMS, TRAXLER, and KING, Circuit Judges.

PER CURIAM:

Richard M. Patterson appeals the district court's order denying his motion filed under 28 U.S.C.A. § 2255 (West 1994 & Supp. 1998). We have reviewed the record and

the district court's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. *See United States v. Patterson,* Nos. CR-97-60-A; CA-98-355-AM (E.D. Va. Oct. 8, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal No. 97-60-A
Civil Action No. 98-355-A

RICHARD M. PATTERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MEMORANDUM OPINION

This matter is before the Court on Petitioner Richard M. Patterson's Motion to Vacate, Set Aside, or Correct a Sentence pursuant to Title 28 U.S.C. § 2255. For reasons set forth below, the Motion is DENIED.

I.

On April 22, 1997, a jury convicted Petitioner of kidnaping. *See* 18 U.S.C. § 1201(a). On August 1, 1997, Petitioner was sentenced to 121 months incarceration and five years supervised release; he was also ordered to pay a $100 special assessment. Petitioner appealed his conviction, but then moved to dismiss his appeal, which the Fourth Circuit granted, with prejudice on January 12, 1998. Petitioner alleges that he received ineffective counsel prior to the trial, during the trial, and during sentencing.

II.

In order to prevail on a 28 U.S.C. § 2255 motion, Petitioner must show that "the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice' and . . . 'present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.' " *Davis v. United States,* 417 U.S. 333, 346 (1974) (quotation ommitted). Unless Petitioner can prove that his conviction was the result of a "fundamental defect," or that "exceptional circumstances" exist compelling a remedy, his Motion must be rejected.

In his Motion, Petitioner asserts a denial of his Sixth Amendment right to effective assistance of counsel. To properly allege an ineffective assistance of counsel claim, a petitioner must satisfy a two-prong test. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). First, Petitioner must establish conduct by counsel that "fell below an objective standard of reasonableness," and in doing so, Petitioner must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable assistance." *Id.* at 689, 104 S.Ct. at 2065. Second, Petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

III.

Petitioner makes several general allegations of ineffective counsel without explaining what counsel should have done differently, and how that course of action would have led to a different outcome at trial. Without specific and affirmative showings, this Court will not vacate, set aside, or correct a sentence. *See Briley v. Bass,* 750 F.2d 1238, 1248 (4th Cir. 1984).

Petitioner contends that prior to the eve of trial, his lawyer spoke to him on only three occasions and for only thirty minutes. Petitioner's claim is contradicted by his regular contact with Petitioner through an assistant, Jack Maro. (Govt.'s Ans. Opp. Pet.'s Mot., Attach. B.) The attorney's contention is supported by Jack Maro's presence as assistant counsel at the trial. (Tr., pp. 15-16; 187-88.) This contention does not support Petitioner's claim of ineffective assistance of counsel.

Petitioner's next claim of ineffective assistance of counsel alleges that counsel never visited, took pictures of, or chatted with people working at the scene of the crime. Had counsel done so, then at trial, counsel could have shown the jury that the kidnaping victim, Keith Cottrell ("Cottrell") had several escape routes available to him. This claim has no merit because Petitioner's attorney established at trial, by his cross-examination of Cottrell, the existence of several escape routes. (Tr. pp. 101-17.) Even if the additional evidence might have been helpful, it does not suggest a reasonable probability that the result reached by the jury would have differed had they been exposed to it.

In Petitioner's next claim, he alleges that his attorney failed to interview witness Linda Cottrell in a timely fashion prior to the trial. Petitioner, however, does not explain how his defense was negatively affected by the "late" pre-trial interview; therefore, this claim fails.

Petitioner also argues that his lawyer never investigated the victim's criminal history for impeachment purposes. The Court gives little credence to this argument as counsel, by cross-examination of Cottrell and by calling other witnesses to testify, established that Cottrell had been involved in fraudulent and dishonest activities. (Tr., pp. 132-34; 230-31; 238-39; 143.)

Petitioner further contends that counsel failed to conducct discovery showing that Cottrell had rearranged and removed the furniture himself. This showing would have supported the theory that Cottrell concocted the kidnaping story and then blamed it on Petitioner and his associates. An affidavit by Detective Brian Ford strongly refutes Cottrell's ability to remove the furniture himself given the timing of the relevant events and the arrival of the police at the crime scene. Accordingly, the Petitioner has not shown a reasonable probability that, but for the additional discovery, the result of his trial would have been different.

In his next argument, Petitioner maintains that his counsel was ineffective in that he refused to allow Petitioner to take the stand at trial and "explain away" the circumstances surrounding his confession. At the pretrial hearing, Petitioner testified that he did not remember making his confession. (Govt.'s Ans. Opp. Pet.'s Mot., Attach. J, pp. 41-44.) Had Petitioner taken the stand, it is unlikely that he would have had any credibility because any story would have contradicted his prior testimony of lack of memory. Further, defense counsel asserts by affidavits that Petitioner was opposed to testifying. (Govt.'s Ans. Opp. Pet.'s Mot., Attach. B, p. 7.) The Court is not convinced that if Petitioner had taken the stand, the outcome of the proceeding would have been different. Accordingly, this claim also fails.

Petitioner contends that counsel failed to interview or call to the stand a key witness, Hans Nearhoof, "who could have been utilized to off-set the concept of kidnaping." After reviewing the FBI report pertaining to an interview of Hans Nearhoof, the Court does not find that it was unreasonable for Petitioner's counsel not to call Nearhoof to testify at trial. (Govt.'s Ans. Opp. Pet.'s

Mot., Attach. F.) Nearhoof might have provided some testimony favorable to Petitioner's defense, but he also might have offered information in support of the Government's case. The Court does not find that counsel's tactical decision not to call Nearhoof constituted ineffective assistance of counsel. *See Briley v. Bass*, 750 F.2d 1238, 1247 (4th Cir. 1984).

Petitioner alleges that his counsel failed to interview or call Robert Barnhouse as a witness. After looking at the testimony Robert Barnhouse gave on July 9, 1997 at David James Hess's trial (Hess was one of Petitioner's co-conspirators in the kidnaping), and assuming that Barnhouse would have given substantially the same testimony in Petitioner's trial, the Court does not find that the failure to interview or call Barnhouse as a witness would have changed the outcome of Petitioner's trial.

Petitioner also argues that his attorney failed to inform him about the consequences of the kidnaping charges and failed to arrange a plea agreement for him. Contrary to Petitioner's allegations, the Government offered the Petitioner a plea to kidnaping and the opportunity to provide the Government with substantial assistance. That plea expired by its own terms. (Govt.'s Ans. Opp. Pet.'s Mot., Attach. D.) Moreover, Petitioner's former attorney maintains by affidavit that he informed Petitioner about the consequences of the kidnaping charge and encouraged him to plea. In light of the evidence before the Court, and Petitioner's bare allegation, the Court finds that Petitioner's claim has no merit.

Petitioner alleges that his counsel failed to make objections at trial. Petitioner's contention that inadmissible statements of co-defendants were admitted fails because he has not pointed to specific statements that were improperly let into evidence, and Petitioner does not explain

how the statements affected the outcome of the proceeding. Moreover, Petitioner does not explain how holding a hearing on what co-consiprator statements the Government intended to introduce would have changed the outcome of the trial.

Petitioner further contends that counsel failed to bring forth the nature of Cottrell's "swindlings." After reading the transcript, the Court finds that counsel did elicit testimony attesting to these swindlings. (Tr., pp. 235-46; 230-31; 132-33.) Accordingly, this claim of ineffective assistance of counsel has no merit.

Petitioner alleges that counsel was ineffective in his representation at sentencing. Petitioner's allegation that counsel failed to object to the Presentence Report is false; in fact, counsel successfully argued that a dangerous weapon enhancement was inapplicable, and the Court did not consider that enhancement. Petitioner also contends that counsel failed to move for a downward departure on the basis of Petitioner's cooperation and minimal role. Petitioner, however, does not provide evidence of how he cooperated or played a minimal role; therefore, this Court does not find that these allegations suffice for a finding of ineffective assistance of counsel.

Petitioner alleges that by counsel's "failing to utilize Hans Nearhoof, the defendant suffered a six point enhancement, due to victim impact and ransom." The Court is not convinced, based on Petitioner's two confessions, and the FBI report on Hans Nearhoof, that testimony by Hans Nearhoof would have substantiated Petitioner's allegation that the victim caused his own injuries. Moreover, it is unclear how the victim's injuries would be applicable to the six point ransom enhancement. Accordingly, this claim is without merit.

Petitioner also contends that counsel should have argued for a downward departure based on Petitioner's assistance. This assertion fails because under U.S.S.G. § 5K1.1, "substantial assistance to authorities," downward departures apply when a defendant helps with the investigation and prosecution of others, not the defendant himself. Petitioner mentions that he was of assistance in obtaining an indictment of David Hess, but Petitioner fails to explain how he was of any assistance. Accordingly, Petitioner was not prejudices by this argument not being raised.

Petitioner asserts that if he had testified at his sentencing, he could have refuted the Government's allegation of obstruction. He, however, fails to explain what he would have argued and how that would have changed the outcome of sentencing. Petitioner also alleges that his counsel failed to raise Petitioner's family circumstances as a basis for a downward departure. The Court does not find Petitioner's family circumstances compelling enough to have warranted a downward departure. Under U.S.S.G. § 5H1.6, "[f]amily ties and responsibility to the community are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." Accordingly, these last arguments lack merit.

IV.

Petitioner fails to raise any claims demonstrating that he is entitled to post-conviction relief. Accordingly, Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 is DENIED.

An appropriate Order shall issue.

October 8th, 1998 /s/ James C. Cacheris
Alexandria, Virginia United States District Judge

[Filed Oct. 8, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal No. 97-60-A
Civil Action No. 98-355-A

RICHARD M. PATTERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ORDER

In accordance with the accompanying Memorandum Opinion, it is accordingly ORDERED:

(1) that Petitioner's Motion filed pursuant to 28 U.S.C. § 2255 is DENIED; and

(2) the clerk shall forward copies of this order to all counsel of record.

October 8th, 1998
Alexandria, Virginia

/s/ James C. Cacheris
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISRICT OF VIRGINIA
Alexandria Division

Criminal No. 97-60-A

UNITED STATES OF AMERICA,

v.

RICHARD M. PATTERSON,
Defendant

ORDER

This matter comes upon the Defendant's Motion for Certificate of Appealability, and upon consideration thereof and it appearing to the Court that there is no good cause therfor, it is accordingly ORDERED:

(1) that the Defendant's Motion for Certificate of Appealability DENIED.

(2) that the Clerk shall forward copies of this Order to all counsel of record.

/s/ James C. Catheris
United States District Judge

Alexandria, Virginia
November 2, 1998

APPENDIX C

[Filed August 9, 1999]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-7547
CR-97-60-A
CA-98-355-AM

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

RICHARD M. PATTERSON,
Defendant-Appellant

On Petition for Rehearing
and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Clerk